Public Prosecutor v Mohd Romzan bin Ramli

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT(3) 42–19– OF 2007
ZAWAWI SALLEH JC
22 JANUARY 2008

Criminal Law — Penal Code — s 376A — Incest — 11-year-old victim — Appropriate sentence

Criminal Procedure — Appeal — Sentence, against — Incest — 11 year-old victim — Whether six years' imprisonment and one stroke of the cane manifestly inadequate

Criminal Procedure — Plea of guilty — Mitigating factor — Whether automatic discount in sentence warranted — Whether rule as to such discounted sentence subject to exceptions

Criminal Procedure — Sentencing — General principles — Deterrence and denunciation, consideration of

Criminal Procedure — Sentence — Incest — 11-year-old victim — Whether the parent/child relationship an important factor for consideration — Whether sentence ought to express society's revulsion and serve as a deterrent to others

The accused pleaded guilty in the sessions' court to a charge of incest under s 376A of the Penal Code. The accused had committed the crime upon his 11-year-old stepdaughter. He was convicted and sentenced to six years' imprisonment and one stroke of the cane. The Public Prosecutor appealed against sentence contending that it was manifestly inadequate.

Held, allowing the appeal and enhancing the sentence:

(1) An appellate court will not alter a sentence appealed against merely because the appellate court might have passed a different sentence. It must be shown that the sentence passed by the lower court was so manifestly excessive or inadequate that it could be said that the lower court had erred in principle that would warrant the intervention of the appellate court (see para 6).

(2) The sentence passed by the sessions' court did not adequately reflect Malaysian society's abhorrence to incest. The sessions' court judge had erred in law and in fact in not considering the principles of retribution and denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of the particular offender. Denunciation mandates that a sentence should also communicate society's condemnation of the particular offender's conduct (see para 12).

(3) The relevance of both retribution and denunciation as goals of sentencing underscores that the Malaysian criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Malaysian criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated (see para 13).

(4) The relationship between the parent and a child, including stepchild, was an important factor that the sessions' court judge ought to have taken into consideration in imposing an appropriate sentence against the respondent. The stepfather/stepdaughter relationship in this case made the offence more heinous than the ordinary. The respondent exploited and perverted the bond of trust, love and devotion that the family relation is meant to nurture. The respondent deserved a severe sentence which expressed society's revulsion at his crimes and as a deterrent to other would be offenders (see para 15).

(5) Although the respondent had pleaded guilty, the discount for pleading guilty is only a general rule and is subject to exceptions. In the instant case, the sentence of six years' imprisonment and one stroke of the cane was not only manifestly inadequate but was also not in line with the established judicial principles. Accordingly, under s 316(b) of the CPC, the sentence ought to be set aside and substituted thereof with a sentence of 11 years' imprisonment and three strokes of the cane, the term of imprisonment to run from the date of arrest (see paras 22 & 24).

[Bahasa Malaysia summary

Tertuduh telah mengaku bersalah di mahkamah sesyen kepada pertuduhan sumbang mahram di bawah s 376A Kanun Keseksaan. Tertuduh telah melakukan jenayah kepada anak tirinya yang berusia 11 tahun. Beliau telah disabitkan dan dihukum enam tahun penjara dan satu sebatan rotan. Pendakwa Raya telah merayu terhadap hukuman dengan menyatakan bahawa ianya adalah dengan nyatanya tidak mencukupi.

Diputuskan, membenarkan rayuan dan menambah hukuman:

(1) Mahkamah yang mendengar rayuan tidak akan mengubah satu-satu hukuman yang dirayu hanya kerana mahkamah rayuan berkemungkinan memberikan satu hukuman yang berbeza. Ia mesti menunjukkan bahawa hukuman yang diberikan oleh mahkamah di bawah adalah begitu jelas keterlaluan atau tidak mencukupi yang boleh dikatakan bahawa mahkamah di bawah telah khilaf dalam prinsip bahawa mewajarkan campur tangan mahkamah rayuan (lihat perenggan 6).

(2) Hukuman yang telah diberikan oleh mahkamah sesyen tidak cukup menggambarkan masyarakat Malaysia yang sangat membenci sumbang mahram. Hakim mahkamah sesyen telah terkhilaf dalam undang-undang dan fakta dalam tidak mempertimbangkan prinsip-prinsip pembalasan dan kecaman. Pembalasan memerlukan satu hukuman kehakiman yang sebenarnya menggambarkan moral pesalah tersebut yang patut dipersalahkan. Mandat kecaman adalah satu hukuman yang juga berhubung dengan kutukan masyarakat kepada tindakan pesalah tersebut (lihat perenggan 12).

(3) Hubungan kedua-dua pembalasan dan kecaman adalah matlamat hukuman yang digariskan bahawa system keadilan jenayah Malaysia adalah bukan hanya satu sistem yang luas dengan hukuman yang negatif yang telah dirancang untuk mencegah secara objektif tindakan yang memudaratkan dengan meningkatkan kos, pesalah mestilah menanggungnya dalam melakukan satu-satu kesalahan. Undang-undang jenayah Malaysia adalah system berkenaan dengan nilai. Satu-satu kesalahan yang jelasnya dikecam adalah yang mana nilai-nilai ini berhubung kait (lihat perenggan 13).

(4) Hubungan di antara ibu bapa dan seorang kanak-kanak, termasuk anak tiri, adalah faktor penting yang mana hakim mahkamah sesyen harus mengambil pertimbangan dalam menjatuhkan hukuman yang sesuai terhadap responden. Hubungan bapa tiri/anak perempuan tiri dalam kes ini membuatkan kesalahan lebih kejam daripada biasa. Responden mengeksploitasi dan menyumbang ikatan kepercayaan, kasih dan sayang hubungan kekeluargaan yang sepatutnya dipelihara (lihat perenggan 15).

(5) Walau pun responden telah pun mengaku bersalah, diskaun untuk pengakuan bersalah hanyalah peraturan am dan tertakluk kepada pengecualian. Dalam kes ini, hukuman enam tahun penjara dan satu sebatan rotan bukan hanya secara jelasnya tidak mencukupi tetapi juga tidak selaras dengan prinsip kehakiman yang mantap. Sewajarnya, di bawah s 316(b) KTJ, hukuman tersebut seharusnya diketepikan dan

diganti dengan hukuman 11 tahun penjara dan tiga sebatan rotan, tempoh penjara dijalankan daripada tarikh ditangkap (lihat perenggan 22 & 24).]

Notes

For cases on general principles of sentencing, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4263–4267.
For cases on mitigating factor, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2634–2635.
For cases on Penal Code generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1262–2016.
For cases on sentence, against, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 692–720.
For cases on sentence generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3284–4160.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534 (refd)
Benton v State, 461 SE 2d 202, 205 (Ga 1995) (refd)
Bhandulanda Javatilake v PP [1982] 1 MLJ 83 (refd)
Ismail Rashid v PP [1999] 4 CLJ 402 (refd)
Leken @ Delem ak Gerik (M) v PP [2007] 3 MLJ 730 (refd)
Leong Ka Kong v PP [1976] 2 MLJ 21 (refd)
Mohd Zandene Arifin v PP [2006] 5 CLJ 663 (refd)
PP v Mohd Nor & Ors [1985] 2 MLJ 200 (refd)
R v Sargent [1974] 60 CrAppR 74 (refd)

Legislation referred to

Criminal Procedure Code s 316(b)
Penal Code ss 376A, 376B(1)

Husmin Hussin (Deputy Public Prosecutor) (Johor State Legal Advisor Office) for the appellant.
Respondent appeared in person.

Zawawi Salleh JC:

THE APPEAL

[1] This was an appeal by the public prosecutor ('appellant') against the sentence of six years imprisonment and one stroke of rotan passed by the learned sessions court judge in Johor Bahru in respect of an offence of incest

under the provision of s 376A of the Penal Code and punishable under s 376B(1) of the same Code.

THE CHARGE

[2] The charge preferred against the accused ('respondent') reads as follows:

> Bahawa kamu di antara awal Januari 2006 hingga 26 Mei 2006, di dalam bilik rumah No 433, Jalan Perak 4, Taman Bersatu, Kulai dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah melakukan persetubuhan dengan seorang perempuan Melayu nama Nurul Atikah bte Abd Kadir berumur 11 tahun, yang mana oleh kerana perhubungan kamu dengannya adalah tidak dibenarkan di bawah undang-undang dan hukum agama yang terpakai kepada kamu untuk berkahwin dengannya, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 376B(1) Kanun Keseksaan.

[3] Upon the charge being read and explained to the respondent, he had pleaded guilty and understood the nature and consequences of his plea.

THE FACTS OF THE CASE

[4] The facts tendered by the prosecution were as follows:

(1) Pengadu di dalam kes ini Abd Kadir bin Yunus, bapa kepada mangsa Nurul Atikah bte Abd. Kadir di dalam kes ini telah membuat report iaitu Kulai/004293/06 di mana beliau telah melihat mangsa dalam keadaan pendiam semasa tinggal bersama dengan bekas isterinya iaitu Salasiah bte Ibrahim dan bapa tirinya ('OKT'). Pengadu telah mengambil semula mangsa untuk tinggal bersamanya di No 27, Sri Sementa 1A, Taman Sri Sementa, Kapar, Klang.

(2) Mangsa telah tinggal bersama dengan OKT iaitu bapa tirinya dan juga ibunya Salasiah bte Ibrahim di alamat No 433, Jalan Perak 4, Taman Bersatu, Kulai, Johor semenjak tahun 2001 selepas sahaja OKT berkahwin dengan ibunya. Sijil nikah adalah seperti bernombor Siri KPN 1806010100 I (No 090838). Perkahwinan ini dilangsungkan di Surau Al-Taqwa, Rumah Murah Kulai, Johor pada 18 Jun 2001.

(3) Pada tahun 2006, pada masa itu mangsa dalam darjah 5 mengesahkan bahawa pada satu malam OKT telah masuk ke dalam biliknya di mana OKT telah mengarahkan mangsa membuka seluar.

(4) Mangsa berasa takut dan membuka seluarnya. Selepas seluar dibuka, OKT telah memasukkan jarinya ke dalam kemaluan mangsa. Selepas itu, OKT telah memasukkan kemaluannya ke dalam kemaluan mangsa. Mangsa berasa sakit di kemaluan dan berasa sakit ketika ingin membuang air kecil.

(5) Kejadian ini berlaku semasa ibu mangsa keluar bekerja dan berulang beberapa kali sehinggalah mangsa ini diambil balik oleh bapanya.

(6) Menurut mangsa juga, beliau pernah beberapa kali melihat kemaluan OKT yang keras semasa OKT merogolnya. OKT juga pernah memukul mangsa dan memberi ugutan supaya tidak menceritakan perkara ini kepada sesiapa. Mangsa berasa begitu takut.

(7) Akibat daripada perbuatan OKT, mangsa terpaksa dipakaikan pampers pada waktu malam kerana mangsa mempunyai masalah kencing pada waktu malam. Selain dari itu, selalu terdapat lendir berwarna kuning di kemaluan mangsa akibat daripada perbuatan OKT

(8) Mangsa telah dibawa berjumpa doktor pada 11 Jun 2006, di mana didapati pada kemaluan mangsa terdapat kesan koyakan lama pada darjah pukul 3, 6 dan 10 dengan ada kesan lendir di kemaluan mangsa.

(9) Akibat daripada kejadian tersebut juga, mangsa terpaksa dirawat oleh Pakar Psikologi.

(10) Berdasarkan kepada pengakuan OKT dan juga siasatan polis, OKT melakukan kesalahan yang boleh dihukum di bawah s 376B(1) Kanun Keseksaan.

THE GROUNDS OF APPEAL

[5] The grounds of appeal may be summarized as follows:

(a) whether the learned sessions court judge had erred in law and in fact in not imposing a deterrent sentence on the respondent to reflect the abhorrence of society to crimes of this nature;

(b) whether the learned sessions court judge had erred in law and fact in not taking into account the fact that the respondent, as the stepfather of the victim, had breached the trust which his conduct entailed in relationship to his stepdaughter of tender years; and;

(c) whether the learned sessions court judge had erred in law and in fact in not taking into account the trauma, the suffering and the injurious effect as the direct result of the respondent's despicable acts on the victim.

[6] It is trite law that an appellate court does not alter a sentence which is the subject of an appeal because the members of the court might have passed a different sentence. It would have to be shown that the sentence passed by the lower court was so manifestly excessive or inadequate so that it could be

A said that the lower court must have erred in principle that would warrant the intervention of the appellate court:

(1) Per Abdul Hamid J (as he then was) in *Leong Ka Kong v Public Prosecutor* [1976] 2 MLJ 21 at p 22:

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> It is settled law that sentences should not be interfered with by the appellate court merely because the individual presiding in the higher court might, having personal views on the matter, have passed a different sentence.

C (2) Per Abdul Hamid Omar CJ (Malaya) (as he then was) in *Public Prosecutor v Mohd Nor & Ors* [1985] 2 MLJ 200, at p 202:

> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere with or disturb a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances.
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> And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

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(3) Per Raja Azlan Shah acting LP (as HRH then was) in *Bhandulanda Javatilake v Public Prosecutor* [1982] 1 MLJ 83:

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> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion
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> G involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar
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> H facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with
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> I the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[7] I shall now consider whether the learned sessions court judge had erred in principle in imposing on the respondent the sentence appealed against. The grounds of appeal are now separately discussed:

FIRST GROUND

[8] There is little doubt that the prohibition against incest is directly reflective of the moral concern of our society. Morality must and will remain a part of the criminal law. The basis of criminal law exists because there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole (see Devlin, *The Enforcement of Morals* 4, 6–18, 20, 20–23 (1959). Thus, criminal statutes prohibiting incestuous relationship reflect the belief that incest is a wrong against the public largely because of its potential to destabilise the family, traditionally regarded as society's most important unit [see Joyce McConnell, *Incest as a Conundrum: Judicial Discourse of Private Wrong and Public Harm*, 1 Tex J Women 85 L 143, 150 (Spring 1992)].

[9] A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or to her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person (see s 376A of the Penal Code). The taboo against incest has been a consistent and almost universal tradition with recorded proscriptions against incest existing as early as 1750 BC [see Sara Robbins, *Law: A Treasury of Art and Literature* 20 – 22 (1990)]. The incest taboo has been characterized as one of the most important human cultural development and is found in some form in all societies. Being primarily cultural in origin, the taboo is neither instinctual nor biological and has little to do with actual blood ties. Anthropologists and sociologists claim the significance of the incest taboo is two fold: (1) the restriction forces family members to go outside their families to find sexual partners, requiring people to pursue relationships outside family boundaries that help form important economic and political alliances, and (2) to maintain the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority and by reducing competition and jealous friction among family members [see *Benton v State*, 461 SE 2d 202, 205 (Ga 1995) (Sears J, concurring)].

[10] YB Dr Rais Yatim, the then Minister in the Prime Minister's Department, when tabling the second reading of Penal Code (Amendment) Bill 2001 in Dewan Rakyat has stated that:

> ... kerajaan memandang kesalahan ini sebagai suatu jenayah yang keji dan perlu ditangani dengan sewajarnya.

[11] There is a plethora of cases expressing Malaysian society's abhorrence to crime of incest:

(i) Per KN Segara J (as he then was) in case of *Ismail Rashid v Public Prosecutor* [1999] 4 CLJ 402:

> Incest is a sin that can hardly be forgiven. Therefore, when a father rapes his daughter and is convicted in court, any sentence passed must reflect the abhorrence of society to such a heinous and despicable act. A sufficiently strong and effective signal must also be sent out to would-be rapists of this species that the court would not hesitate to come down hard on them, in order to protect those naive, helpless and innocent children who had placed unquestioning trust, faith, loyalty and confidence in their fathers to be role models as well as pillars of strength and protection at all times, only to see their lives shattered, humiliated and traumatized by an act of lust that could have easily been curbed and controlled by any self-respecting human being.

(ii) Per Hamid Sultan JC in *Leken @ Delem ak Gerik (M) v Public Prosecutor* [2007] 3 MLJ 730:

> The appellant here had an incestuous relationship with the stepdaughter who is likened to be his own daughter and a prohibited degree for marriage under his own customary law and comes before the court without any shame and remorse and says that the victim, aged 17 who is supposed to be in his custody care and control, consented. I consider this an abhorrent, despicable and dastardly crime; and that it must be given the statutory maximum in terms of imprisonment as well as whipping with the usual reduction for plea of guilt.

(iii) Per Ahmad Maarop J in *Mohd Zandene Arifin v Public Prosecutor* [2006] 5 CLJ 663:

> In my view the offences committed by the appellant had outraged the feeling of the community, warranting even the maximum sentences to be imposed on him. Furthermore the prevalence of this type of offence must also be taken into consideration by the court in assessing sentence. In this case public interest demands that sentences which shows the society's utter abhorrence for this type of offence be passed. The sentences passed must serve as a plain warning that in this country the severest possible penalty awaits any person who commits incest. I am satisfied that the element of public interest and the consideration that the offences committed by the appellant were very grave must prevail, and override the crushing effect which the sentences will have on the appellant.

[12] With respect, I am of the considered view that the sentence passed by the learned sessions court judge in this case did not reflect adequately the

Malaysian society's abhorrence to crimes of this nature. The learned sessions court judge had erred in law and in fact in not taking into consideration another important aspect of the principle of sentencing, namely, retribution. Retribution is an accepted, and indeed important, principle of sentencing in our Criminal Law. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of value as enshired in our Penal Code. As Lord Justice Lawton stated in *R v Sargent* [1974] 60 CrAppR 74 at p 77:

> There is, however, another aspect of retribution which is overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which they, the courts can do this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is lead public opinion.

[13] The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Malaysian as expressed by the Penal Code.

SECOND GROUND

[14] It was evident from the facts of the case that the respondent was the stepfather of the victim. The respondent had threatened her not to say anything about the crime perpetrated by him. The victim acquiesced in this warning. It was also evident from the facts of the case that the victim was of tender years (11 years old) at the time of the commission of the offence and therefore the victim's natural physical and mental limitations rendered her particularly vulnerable because of an inability to resist, a difficulty in calling for help or a difficulty in testifying against the perpetrator.

[15] The relationship between the parent and a child, including stepchild, is an important factor that the learned sessions court judge ought to have taken into consideration in imposing an appropriate sentence against the

respondent. The abuse of that relationship is very significant in this case. The stepfather/stepdaughter relationship in this case indeed makes the offence more heinous than ordinary. Standing in the role of a parent, the respondent should have been a figure in whom his stepdaughter could put her trust and to whom she could turn for protection. Instead, the respondent violated that trust and became one his stepdaughter needed to be protected from, instead of running to protection for. The relationship should be one of encouragement, trust, love and devotion, instead, the respondent exploits and perverts the very bound of trust, love and devotion that the family relation is meant to nurture.

[16] The respondent enjoys a position of mental authority over the victim, because they are living in the same house. The respondent thinks his home offers him a safe haven for his crime, which an accessible victim, over whom he may feel he can exercise a proprietary entitlement. The victim, because of her age, to a great extent, lives totally at the mercy of the respondent. The victim places trust in the respondent. As such, the respondent, as the victim's stepfather, held a position of trust that facilitated this crime against the victim. The victim was threaten and forced to silent and to submit to this abuse at anytime the respondent chooses and there is no rational cause for the abuse that the victim would understand.

[17] It is difficult for this court to conceive of a circumstances where in a child would be more vulnerable to such an offence than when the crime was perperated by a person entrusted with the victim's supervision and control. The respondent, as a stepfather of the victim, abused his position as a parent in a concrete way by using it as an occasion to rape her. He exploits the close relationship with the victim that accompanied the rule of a parent. Such act constitutes by any standard an abhorrent, despicable and dastardly crime.

[18] In the circumstances of the case, without doubt, the respondent deserves a severe sentence which expresses society's revulsion at his crimes and as a deterrent to other would be offenders.

THIRD GROUND

[19] In exh P3, Dr Norsham Ismail, Medical Officer attached to Klinik Pakar Obstetrik/Ginokoloji, Sultanah Aminah Hospital, Johor Bahru has stated that 'on examination, noted patient look depressed with poor eye contact Patient was given antibiotic for 1 week and she's being referred to Psychiatry and Social Worker for further assessment and counseling.

[20] The court was not surprised with the above observation because sexual abuse by parent is comprised of, not only the physical act of molestation, but

as explained above, the betrayal of trust and love. The end result of this traumatic experience can be substantiated in victims who may suffer the consequences of the abuse for an entire lifetime. Children, who are sexually abuse by a father figure, endure feelings of shame, guilt, worthlessness and hopelessness. The emotional effect of sexual abuse is more harmful than any other form of child abuse. As result, many spend years trying to recover from the damage that was done (see: An Uncommon Bond, Susan Maree Seavans, http: //www, suite 101.com/article.cfm/child abuse and recovery/9 5644)

[21] The victim was not only exhibited behavioural and emotional symptoms but some physical signs such as abnormal with urination and irritation to the genital area. It was evident from the facts of the case that *akibat daripada perbuatan OKT, mangsa terpaksa dipakaikan pampers pada waktu malam kerana mangsa mempunyai masalah kencing pada waktu malam. Selain daripada itu, mangsa juga selalu terdapat lendir berwarna kuning di kemaluan akibat daripada perbuatan OKT*.

[22] The respondent had pleaded guilty, thereby saving the victim the unfortunate experience of having to give evidence in court, as well as the mental torture and anguish the victim would suffer. Therefore, the respondent is entitled to the discount given usually to those who plead guilty. However, courts have stressed that this is only as a general rule and that there can be exceptions. Hence, in the Court of appeal case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534, Augustine Paul JCA opined as follows:

> However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v Public Prosecutor* [1996] MLJU 159; *Public Prosecutor v Leo Say & Ors* [1985] 2 CLJ 155). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v Zaidon Shariff* [1991] 1 MLJ 321). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnely v R* [1997] 91 ACrimR 550 at p 554:
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> > A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances. The circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v Public Prosecutor* [1980] 2 MLJ 13; *Public Prosecutor v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537; *Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181). A guilty plea cannot also be a powerful mitigating factor when effectively no defence to the charge is available to the accused (see *Public*

Prosecutor v Low Kok Wai [1988] 3 MLJ 123). If a plea of guilty is made too late in the trial it may also cease to have mitigating effect (see *Pegawai Pendakwaraya v Dato Nallakaruppan Solaimalai* [1999] MLJU 74). The absence of mitigating factors in favour of the accused like, for instance, the existence of previous convictions may also deprive the guilty plea of its effect. There can therefore be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 401). Be that as it may, where there is a departure from the general rule the reason for not treating the guilty plea as a mitigating factor must be reflected in the grounds of judgment (see *Tan Clay Chen v Public Prosecutor* [2001] 1 MLJ 135).

[23] On this particular issue, KN Segara J (as he then was) has stated in *Ismail Rashid v Public Prosecutor* as follows:

> Perhaps, I should take this opportunity to impress upon sessions court judges, particularly in the State of Kedah, that the incidents of rape committed by fathers on their daughters seem to be rampant. Offenders think that a plea of guilty would enable them to escape the consequences of a severe penalty. It is a fallacy to think that the courts are prohibited from meteing out the maximum sentence permitted for the offence, upon a plea of guilty. Judicial officers, too, should not labour under the notion that in determining an appropriate sentence, a 'discount' should automatically be given in all cases upon a plea of guilty, without prior exercise of judicial discretion to all facts and circumstances relating to the offence, the offender, the victim, the interest of the public, as well as the Malaysian culture, social behaviour and propriety.
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> This appeal before me is a classic example of a case where no 'discount' should be given to the appellant for having pleaded guilty. The sentence must reflect Malaysian society's abhorrence to crimes of this nature. The appellant should be kept away from his daughters for as long as possible — nay, not just his daughters, perhaps, other children as well, for he may consider them as desirable prey to satiate his lust.

CONCLUSION

[24] For the reasons adumbrated, I am of the view that the sentence of six years' imprisonment and one stroke of rotan imposed by the learned sessions court judge on the respondent is not only manifestly inadequate but it is also not in line with the established judicial principles. Accordingly, under s 316(b) of the Criminal Procedure Code, the sentence imposed by the learned sessions court judge is set aside and substituted thereof a sentence of eleven years imprisonment and three strokes of rotan. The term of imprisonment is to run from the date of arrest. Appeal allowed. Sentence enhanced.

Appeal allowed. Sentence enhanced.

Reported by Andrew Christopher Simon